No petition granted!

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO. 530, MISC.

TOM A. GORDY,

Petitioner

V.

STATE OF TEXAS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Opinion Texas Court of Criminal Appeals, October 28, 1953, Tom Gordy, Appellant, v. The State of Texas, Appellee (not yet published); Opinion on First Motion for Rehearing, December 9, 1953 (not yet published); Second Motion for Rehearing, overruled without opinion, January 13, 1954.

JURISDICTION

Petitioner alleges jurisdiction under 28 U.S.C.A., Sec. 1257 (3), alleging infringements of rights, privileges and immunities guaranteed him under the Constitution of the

United States by virtue of the Fifth and Fourteenth Amendments thereto. (Pages 3 and 4 of Petition for Writ of Certiorari.)

QUESTIONS PRESENTED

1. Does this Court have jurisdiction?

2. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States because the trial court abused its discretion in overruling Petitioner's motion to quash the jury panel and declare a mistrial on grounds of inability to obtain a fair and impartial jury, and the need for time for public sentiment to cool.

3. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States because of the trial court's action in overruling Petitioner's motion for postponement for thirty days to enable the Petitioner's attorney time to acquaint himself with the facts of the case and prepare for trial.

STATUTES INVOLVED

U. S. Const. Amendments V and XIV.

Texas Code of Criminal Procedure (Vernon 1948), Articles 563 and 564.

Texas Penal Code (Vernon 1948), Article 719e.

Title 28, Sec. 1257, U.S.C.A. (3).

Supreme Court Rules, Rule 12, as amended to Sept. 1, 1950.

STATEMENT OF THE CASE

Petitioner was convicted in the County Court of Winkler County, in a trial before a jury, of the offense of unlawfully transferring possession of horse meat to a person and knowing, or in the exercise of reasonable discretion should have known, that the person receiving such horse meat intended to keep it in his possession with the intent to sell it as food for human consumption. The conviction is under Section 3, Article 719e of the Texas Penal Code, as amended, and the punishment assessed at confinement in the county jail for a period of two (2) years and a fine of $1,000.00. This is the maximum penalty for the offense. The case was appealed to the Texas Court of Criminal Appeals, and in an opinion thereon dated October 28, 1953, the Court, after reviewing the above facts and hearing argument, stated that the evidence was sufficient to support the verdict, and that there was no error shown, and the judgment of the trial court was affirmed. The first motion for rehearing was denied on December 9, 1953 by written opinion of that date, and the second motion for rehearing was denied without written opinion on January 13, 1954.

ARGUMENT

1. Does this Court have jurisdiction?

This Petitioner has failed to show this Court that a particular federal question was properly raised on the appeal of this case from the trial court to the Texas Court of Criminal Appeals. Examination of the decision rendered by the Texas Court of Criminal Appeals and of the opinion on first motion for rehearing fails to disclose any ruling by that court on any federal question. The practice in this State requires that the Court of Criminal Appeals pass on all questions properly presented to it on appeal, and where an appellant fails to properly present any question on appeal, the Court is not required to pass on it. Stokes v. State, 136 Tex.Crim. 443, 125 S.W.2d 311 (1939). If there were constitutional matters concerned here, the Court must have passed on them and found no violation, or, in the alternative, the Court having made no mention of constitutional violations, if any, they were not properly presented. Where the State appellate court makes no express ruling pertaining to a federal question but ignores or fails to notice same, this Court has established the rule that it will decline jurisdiction where it appears that the question was not raised in the trial court in accordance with State practice. Mutual Life Insurance Company v. McGrew, 188 U.S. 291 (1903); Layton v. Missouri, 187 U.S.

356 (1902); Jacobi v. Alabama, 187 U.S. 133 (1902); Morrison v. Watson, 154 U.S. 111 (1894).

In such cases, in the absence of affirmative showing to the contrary, it will be inferred by this Court that the question was not decided upon in the State court because of its untimely presentation. Chicago, Indiana and L.R. Company v. McGuire, 196 U.S. 128 (1905). If the Supreme Court (Court of Criminal Appeals) did in fact consider the federal question, the burden was on the Plaintiff to show it. There is no presumption that the Court considered such question. Jacobi v. Alabama, 187 U.S. 133 (1902).

This Petitioner's contentions relating to absence of due process are laid under the Fifth Amendment to the Constitution of the United States. It is well settled that this Amendment constitutes a restriction on the Federal Government and its agencies, but not on the States. Palko v. State of Connecticut, 302 U.S. 319 (1937).

If Petitioner's contentions concerning due process could be said to arise from the requirements of the Fourteenth Amendment to the Constitution of the United States, it is well settled that the due process requirement of the Fourteenth Amendment pertains to the Constitution and laws of the particular state and not to the process of another state or of the United States. Petitioner alleges no violation of the Texas

Constitution.

Due process in one State may not be due process in another. Palko v. State of Connecticut, 302 U.S. 319 (1937); Dohany v. Rogers, 281 U.S. 363 (1930); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884).

While due process is a matter of substance as well as procedure, it does not guarantee against judicial error. The essential elements of due process are notice and opportunity to be heard and to defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accordance with established rules which do not violate fundamental rights. Brown v. South Carolina, 298 U.S. 639 (1936); Owens v. Battenfield, 280 U.S. 605 (1929); Caldwell v. Texas, 137 U.S. 692 (1891); Ex parte Wall, 107 U.S. 265 (1882). From a careful reading of the record we believe the conditions exist that make for a fair trial under due process requirements in Texas courts. Where these conditions are fulfilled, there is no violation of due process of law. Dohany v. Rogers, 281 U.S. 363 (1930); Frank v. Mangum, 237 U.S. 309 (1915).

An examination of the record relating to the trial of the Petitioner provides a clear showing that all of the

due process requirements pertaining to criminal proceedings in the State of Texas were fully complied with.

2. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because the trial court abused its discretion in overruling Petitioner's motion to quash the jury panel and declare a mistrial on grounds of inability to obtain a fair and impartial jury, a fair and impartial trial, and the need for time for public sentiment to cool.

The jury panel admitted that they had read newspaper articles about the case and had discussed or heard the case discussed. By bills of exception No. Four (4) and No. Five (5) it is certified that each member of the jury panel, with the exception of one, stated that they had formed no opinion as to the guilt or innocence of the Petitioner, and they also stated that they could and would disregard everything they had heard and read, and that they would render a fair and impartial verdict based only on the evidence brought forth in the trial.

In the opinion of the Court of Criminal Appeals in this case the Honorable Court states:

"It is noted by the court that every member of the jury panel except one, who was excused, stated that he had no opinion as to the guilt or innocence of the appellant, thus it will be seen that there is an absence of any showing that any prejudice found its way into the jury box of the jury that tried him. Hence no error is shown.
. . .

"Finding no reversible error, the judgment of the trial court is affirmed."

In the opinion on motion for rehearing the Court said:

"Appellant's esteemed counsel in an excellent motion urges us to reconsider our holding herein. He contends that he should have secured a postponement so that public sentiment against appellant might cool and that his case is on all fours with our holding in Rogers v. State, 236 S.W.2d 141. In many respects he is correct in his contention. Two distinguishing factors, however, do exist.

1. This is a misdemeanor case.

2. In the Rogers case much importance was attached to the fact that 44 out of a venire of 105 examined were excused because of fixed opinions. In the case at bar only one was excused for such reason. We have again re-read the examination of the panel in this case and cannot bring ourselves to conclude that prejudice against the accused found its way into the jury box. . . .

"The motion for rehearing is overruled."

The trial court clearly did not err in overruling Petitioner's motion to quash the jury panel and declare a mistrial.

In Hogan v. State, 127 Tex.Crim. 182, 74 S.W.2d 988 (1934), the rule is announced that in selecting jurors those matters involving opinions, feelings, and scruples of a proposed juror, are matters whose decision as to fixedness of opinion or extent to which opinion might affect juror's action, are always first left to the decision of the talesman and if he feels he can try the case impartially, his qualification is then for the trial court.

In Benavides v. State, 143 Tex.Crim. 481, 154 S.W. 2d 260 (1941), (cert.den. 62 S.Ct. 794, 315 U.S. 811, 86 L.Ed. 1210), it was held that the trial court did not err in refusing to sustain the defendant's challenge for cause to certain jurors testifying that they had formed an opinion as to defendant's guilt from street talk and gossip, where such jurors testified that they had not talked with any witness and knew nothing of the facts save rumors and gossip, and that their opinion was not fixed and could be set aside, and that they could try the case on the evidence presented to them and the trial court's charge.

The members of the jury panel from which the jury in this case was selected stated that they had no opinions as to guilt or innocence of Petitioner. There was no basis for Petitioner's motion to quash the jury panel, and no showing of prejudice.

Prejudice is not a ground for postponement of continuance. Accord, Miller v. State, 31 Tex.Crim. 473, 20 S.W. 1103 (1893); Jones v. State, 37 Tex.Crim. 433, 35 S.W. 975 (1896). In Hill v. State, 152 Tex.Crim. 248, 212 S.W.2d 143 (1948), it was held that the Court did not act improperly in overruling the motion for continuance on the ground of public feeling in the county. The Court stated that the motion for continuance is not a statutory ground and therefore the motion is addressed to the sound discretion of the trial court.

The Texas Court of Criminal Appeals in its opinion on appeal of this case said:

> "Bills of Exception No. One (1) and Two (2) complaining of the overruling of appellant's motion for continuance or postponement, the grounds of the motion being that his attorneys had not had sufficient time to prepare for trial, and that a postponement was necessary in order that unfavorable public sentiment against appellant might subside.
>
> "This motion was not a statutory motion for continuance, but one addressed to the sound discretion of the trial judge, and no abuse of such discretion appears. Jones v. State, 240 S.W.2d 771; Hill v. State, 152 Tex.Crim. 248, 212 S.W.2d 143."

In Handy v. State, 139 Tex.Crim. 3, 138 S.W.2d 541 (1939), the Court said:

> "The burden is upon the appellant to prove the existence of such prejudice, and, where evidence is heard, the issue is to be determined by the trial court. The discretion is

upon the trial court to weigh the evidence, and, if from it there arises two conflicting theories, the trial court has the discretion to adopt either. In the absence of the abuse of this discretion, the judgment will not be disturbed on appeal. If, however, the evidence is such that it leads to the conclusion that the bias, prejudice, or prejudgment of appellant or his case is such as renders it improbable that a fair and impartial trial can be given him, the trial court is without discretion to refuse the application."

In Willis v. State, 128 Tex.Crim. 504, 81 S.W.2d 693 (1935), the Court lays down the rule that citizens who have merely read in newspapers reasonably accurate accounts of crime are not for that reason alone disqualified to serve on a jury impaneled to try such crime. Also the Court says:

"Nothing is better settled than that in determining whether the trial court abused his discretion in refusing change of venue in each case must be decided upon its own facts. No two cases are alike. . . . We cannot lay down the rule that because men read the newspapers and thus make contact with what therein appears, they must be held disqualified to serve as jurors. There was no defense in this case. Appellant did not take the stand. . . . The burden is on the appellant to prove the existence of such prejudice, and, where evidence is heard, the issue is to be determined by the trial court. The discretion is upon the trial court to weigh the evidence, and, if from it there arises two conflicting theories the trial court has the discretion to adopt either. . . ."

In Dennis v. United States, 339 U.S. 162 (1950) this Court reaffirmed the principles set down in United States v.

Wood, 299 U.S. 123 (1936), and Frazier v. United States, 335 U.S. 497 (1948), wherein it was stated that while impaneling a jury the trial court has a serious duty to determine the question of actual bias, and broad discretion in its rulings on challenges therefor. The Dennis case was one in which the petitioner was convicted for willfully failing to appear before a congressional committee in compliance with a duly served subpoena. On voir dire examination, government employees on the jury panel were interrogated individually by petitioner's counsel as to whether the fact that petitioner was a Communist, the attitude of the Committee on Un-American Activities toward Communists, or the recently issued Executive Order 9835 providing standards for the discharge of employees upon reasonable grounds for belief that they are disloyal to the Government, would prevent them from rendering a fair and impartial verdict. Seven gave negative answers and said they could render a fair and impartial verdict. They were permitted to serve on the jury. There was no proof of actual bias, and petitioner's challenge of these employees for cause was denied. Held; In the circumstances of this case, petitioner was not denied the trial "by an impartial jury" guaranteed by the Sixth Amendment.

The record in this case discloses that there is no evidence presented that the panel was improperly selected or

otherwise disqualified.

Change of venue as such is provided in misdemeanor cases by Articles 563 and 564 of The Texas Rules of Criminal Procedure, as amended. The Petitioner makes no claim to come within any of the provisions of those statutes. Acts 1953, 53rd Leg., p. 713, ch. 276, Secs. 1 and 2.

3. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because of the trial court's action in overruling Petitioner's motion for postponement for thirty days to enable the Petitioner's attorney time to acquaint himself with the facts of the case and prepare for trial.

The facts show that Petitioner was arrested on the charge in this case on January 31, 1953. Petitioner immediately employed H. L. Roberson, an attorney, who later withdrew from the case on February 9, 1953. On this date Petitioner employed Murry J. Howze. Attorney Howze was unable to confer with Petitioner and begin investigation of the case until February 11, 1953. It was shown that an attorney by the name of Guy McFarland had been employed to represent Petitioner on the examining trial alone. Petitioner's attorney was employed on February 9, 1953, one week prior to date of trial.

In Porter v. State, 86 Tex.Crim. 23, 215 S.W. 201 (1918), it was held that where the accused had practically two days to prepare for trial and had experienced attorneys that a motion to postpone to grant additional time to investigate veniremen was properly overruled.

This matter was addressed to the sound discretion of the trial court, and in the absence of an abuse of discretion, which does not appear from the facts of this case, the action of the trial court will not be disturbed. Accord, Gilbreath v. State, 136 Tex.Crim. 299, 124 S.W.2d 996 (1939); Williams v. State, 145 Tex.Crim. 406, 168 S.W.2d 261 (1943); Jones v. State, 156 Tex.Crim. 248, 240 S.W.2d 771 (1951).

Refusal to grant continuance in a case set for trial 13 days after a copy of the indictment was served, 12 days after an attorney had been appointed by the Court to represent the defendant, and 7 days after another attorney had been employed by the defendant, was not an abuse of discretion. Mason v. State, 74 Tex.Crim. 256, 168 S.W. 115 (1914). Accord, Bradley v. State, 96 Tex.Crim. 81, 256 S.W. 292 (1923). Other cases showing that overruling motion to postpone murder trial for insufficient time for preparation was not abuse of discretion are McKenzie v. State, 116 Tex. Crim. 395, 11 S.W.2d 172 (1928),(rehearing den. 12 S.W.2d 578); Jackson v. State, 115 Tex.Crim. 395, 27 S.W.2d 1102 (1930).

Federal cases follow the same pattern. In Delaney v. U.S., 199 F.2d 107 (C.C.A. 1st 1952), at page 115, the Court said:

> "In passing upon motions for continuance, the trial judge of course has a wide area of discretion; and appellate courts will properly give great weight to a determination of the trial judge that extra court room publicity was not of sort likely to prejudice the defendant at the trial, or to determination that sufficient time had elapsed since the damaging publicity so that a fair trial might reasonably be assured. . . ."

As to both continuance and publicity the Court has wide discretion.

In U.S. v. Vrilium Products Company, 185 F.2d 3 (C.C.A. 7th 1950) (cert.den. 340 U.S. 947) 95 Law Ed. 683, the Court said that the trial court's action upon application for continuance is purely a matter of discretion and not subject to review by appellate court unless it is clearly shown that such discretion has been abused. Accord, Davenport v. U.S., 197 F.2d 157 (C.C.A. 5th 1952) (cert.den. 344 U.S. 835).

In Ray v. U.S., 197 F.2d 268 (C.C.A. 8th 1952), it is stated that whether time allowed counsel for defendant in a criminal prosecution for preparation for trial is sufficient is dependent upon the nature of the charge, the issue presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of pertinent witnesses. In U.S. v. Yodock, 97 F.Supp. 307 (Middle D. Penn.

1951), at page 311, only five minutes with counsel does not afford a basis for relief. Each case must be examined individually.

In this case Petitioner was represented by able counsel who was familiar with the law and the facts of the case. As the trial court and the Court of Criminal Appeals have carefully reviewed the proceedings and have found no abuse of discretion from the examination and re-examination of the records, this decision should not be disturbed.

Another Federal case in point is U.S. v. Wight, 176 F.2d 376 (C.C.A.2d 1949), where the Court said at page 379 of the opinion:

> "The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce, and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255. . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceeding a farce and a mockery of justice."

In this case cited above counsel had fifteen minutes to consult with his client.

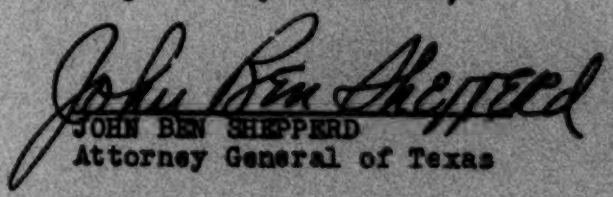
It is clearly apparent from the record in this case that Petitioner was afforded ample time and able assistance to

prepare his case and no error or abuse of discretion is shown.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,



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